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No. 76-528

IN THE

Supreme Court of the United States

October Term, 1976

CONSUMERS POWER COMPANY,
Petitioner,

v.

NELSON AESCHLIMAN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF U.S. LABOR PARTY FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN RESPONSE TO PETITIONS NO. 76-528, AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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DISTRICT OF COLUMBIA

MOTION OF U.S. LABOR PARTY LEAVE TO FILE A BRIEF AMICUS CURIAE

The U.S. Labor Party respectfully moves this Court for leave to file the accompanying brief in this case as amicus curiae.

1. The attorneys for Consumers Powers Company, Atomic Yankee Power Company, and the Baltimore Gas and Electric, petitioners herein, have each given their consent for the filing of this brief by the U.S. Labor Party as amicus curiae.

2. The Solicitor General of the United States has no objection to the filing of this brief.

3. The attorney for Nelson Aeschliman *et al.* has refused to give his consent, and no response has been received from the attorney for the Natural Resources Defense Council.

4. The U.S. Labor Party has a special interest in this case for the following reasons:

a. The U.S. Labor Party is a constituency organization with chapters in 20 states in the United States including the state of Michigan, and has co-thinker parties in Europe, Mexico, and Canada.

b. As an organization reflecting the interests of working people and scientists, the continued development of nuclear energy is vital for the interests of our constituency and for the Nation as a whole, and indeed for the future of mankind and the biosphere.

c. The U.S. Labor Party is officially committed to the policy that:

> "the proper historic mission of the United States as a nation is essentially expressed by its historic development and present potentialities as an industrial power. The specific and urgent mission of this nation is to mobilize those traditions and capabilities to the combined objectives of becoming a leading instrument for the industrial and agricultural development of the world, and meanwhile persue its domestic economic development to the end of increasing its capabilities to fulfill that global mission." (1)

d. Kenneth Dalto, Michigan State Chairman of the U.S. Labor Party, has entered a limited appearance before the Atomic Safety and Licensing Board convened in the matter of Consumers Power, NRC Docket Nos. 50-329 and 50-330, submitting testimony prepared by the Fusion Energy Foundation on the issue of energy conservation.

e. The U.S. Labor Party has numerous members and supporters in the Midland, Michigan, area, and the Party's 1976 Vice-presidential candidate, Wayne Evans, is a resident of Midland.

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1. Section 2.9 of Principles of Membership Association in the Constitution of the U.S. Labor Party, adopted December 1976.

6. The U.S. Labor Party believes that there are very fundamental issues of law at stake in this case which have not been, nor do we believe will be, sufficiently addressed by the parties to the case. These issues are:

a. The legislative intent of Congress in passing the National Environmental Policy Act of 1969 (NEPA), and the extent to which the court below and other courts have extended the scope of NEPA beyond the intent of Congress.

b. Whether NEPA, repealed the traditional commitment of this country to the principles of industrial and technological progress; and whether a rule of law which in practical effect prevents technological progress and innovation is within the spirit of the United States Constitution.

c. Whether NEPA can override the mandate of the Atomic Energy Commission (now Nuclear Regulatory Commission) set forth in the Atomic Energy Act of 1954, to increased energy production and provide for rising living standards.

d. Whether energy conservation and reduced energy consumption is a "reasonable alternative" under NEPA;

e. The effects of such a rule of law upon the physical and human environment and the biosphere as a whole.

WHEREFORE, the U.S. Labor Party respectfully requests this court to permit it to file the brief amicus curiae which is submitted herewith.

Dated: May 31, 1977

Respectfully submitted,

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BRIEF OF U.S. LABOR PARTY AS AMICUS CURIAE

By leave of this Court, the U.S. Labor Party files this brief as *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

The interests of the *amicus curiae* are described in the accompanying motion submitted herewith.

STATEMENT OF THE CASE

In December 1967, the Consumers Power Company (Consumers) of Michigan announced plans to construct two nuclear reactors in Midland, Michigan to produce both electricity and process steam; the date for completion of the reactors was set for 1975. Consumers applied to the Atomic Energy Commission for a construction permit in January 1969. The permit was ordered to be issued in December 1972; the almost-three year period for issuing the license was caused by the revised standards and procedures for licensing which grew out of the ruling of the court below in *Calvert Cliffs*

Coordinating Committee Inc. v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

Today, the Midland power plant is only 20 percent completed; costs have tripled, and the most optimistic start-up date is now the early 1980's.

On a number of occasions, Intervenors ("Saginaw" and "Mapleton") sought judicial review of Nuclear Regulatory Commission rulings. On July 21, 1976, the court below remanded various issues to the Commission for still further consideration. These are issues of energy conservation, safety, and the cost-benefit analysis associated with the nuclear fuel cycle. Following the decision of the court below, the Commission has convened an Atomic Safety and Licensing Board (Board), to conduct hearings in two stages: (1) whether to revoke, suspend, or modify the Midland construction permit, and (2) to substantively reconsider the issues subject to remand. If construction of the plant were to be halted under the present Commission proceedings, it is probable that the Midland plant will never be completed.

The unfortunate history of the Midland plant is not at all atypical of the long procedural delays which have become inherent in the licensing process for construction and operation of commercial nuclear reactors in the United States. Although the United States is the most technologically advanced country in the world, the start-up time for the construction and operation of nuclear power reactors is longer than in any other industrial country.

Opponents of nuclear power have not succeeded in convincing either the United States Congress or any state legislature to prohibit the continued development of commercial nuclear reactors. However, opponents of nuclear power have been able to accomplish many of their aims through the back door, so to speak, by forcing long — sometimes fatal — delays in the licensing process. Since 1974, the nuclear power industry has been in a notable slump, at a point when the Nation clearly needs to develop all energy resources to meet current energy shortages. The case at bar is exemplary of the way in

which opponents of nuclear power have abused the administrative process so as to attempt to win procedurally that which they could not win on the merits. To put it another way, they have tried to win through the administrative and judicial process that which they cannot win through the legislative process.

The Commission itself created the opportunity of such a delay by its unauthorized injection of "energy conservation" issues into licensing proceedings in its ruling in *Niagara Mohawk Power Corporation*, 6 AEC 995, (Nov. 6, 1973) (Consumers App., p. 252-253). Nowhere in NEPA or its history is there any suggestion that a federal agency charged with the licensing of power production should refuse such a license of power production on grounds of energy conservation. In its *Niagara Mohawk* ruling, the Commission virtually repealed the reason for its own existence:

> "This matter arises at a time of deep national concern over energy sources and supply — a concern which this Commission fully shares. In view of our responsibilities under the National Environmental Policy Act, we cannot agree that the subject of energy conservation must be altogether ruled out of licensing proceedings. It is true that the parameters of our statutory power to compel conservation are not clear,. But it does not follow that all evidence should therefore be barred at the threshold..." (Consumers App., p. 252)

The Commission failed to explain how it could help meet a purported fossil fuel shortage by contemplating the refusal to license a nuclear power plant.

Saginaw Intervenors then sought to avail themselves of the newly-fashionable interest in "conservation" by submitting a motion to the Commission which classified 17 objections (out of the 119 objections it had previously filed) as "energy conservation" issues. The Commission later noted in a ruling that Saginaw's "original submission to the Board did not

point up any such common theme," and that Saginaw's paraphrases of its original contentions were "inaccurate and misleading." (Consumers App., p. 266-267).

The decision of the Commission to grant a construction permit was appealed by the Saginaw and Mapleton Intervenors to the Court of Appeals for the District of Columbia. On July 21, 1976, the court remanded the matter of the Consumers Power permit to the Commission for further proceedings with respect to (1) conservation issues, (2) safety issues, and (3) the fuel cycle issues, which the court below said were governed by that same court's ruling in *NRDC* v. *NRC*, 547 F.2d 622 (D.C.Cir. 1976).

In its ruling, the court below construed the National Environmental Policy Act (NEPA) so as to extend it farther than has ever been done before. The court held that "energy conservation" was a "colorable alternative" to building the proposed Midland reactor, and it stated that the Commission had been "capricious and arbitrary" in its application of a "threshold test" to reject Saginaw's "energy conservation" contentions.

The most relevant portions of the opinion of the court below conerning energy conservation are as follows:

> **"Saginaw argues that the Environmental Impact Statement for construction of the Midland reactors did not adequately consider 'alternatives to the proposed action as required . . .' In particular, Saginaw asserts that the EIS was fatally defective for failure to examine energy conservation as an alternative to a plant of this size. The alternatives section of the EIS discusses several non-nuclear methods of power generation, but does not consider any measures for reducing consumer demand.**
>
> **. . . Energy conservation was clearly a 'colorable' alternative relevant to the goals of the project. . . .**
>
> **. . . It follows that energy conservation was not to be dismissed by the Commission without inquiry or explanation." (Consumers App., p.5, 14-15).**

While the decision of the court below is not the first lower court decision to extend the requirements of NEPA far beyond anything ever envisioned by Congress, it is the first time that a reduction of energy production has been proposed as an alternative policy compelled by NEPA. It is the first time that the Commission has been ordered by a court to consider "methods for reducing consumer demand" as part of its legislative mandate. The implications of such a ruling are so farreaching that it fully deserves the extended treatment that we shall give it below.

The court below did rely upon certain precedents as laying the foundation for its latest ruling. The most important of these were *Calvert Cliffs Coordinating Committee, Inc.* v. *AEC*, 449 F. 2d 1109 (D.C.Cir. 1971), and *NRDC* v. *Morton*, 458 F. 2d 827 (D.C. Cir. 1972). *Calvert Cliffs* held that NEPA did in fact apply to the Atomic Energy Commission, and then created the "NEPA mandate" of a "cost-benefit analysis." It was this which created the basis for broad judicial review of agency decisions under NEPA — something which was never even contemplated by Congress. Then, *NRDC* v. *Morton* extended the range of "alternatives" to be considered under NEPA to include alternatives such as partial or total abandonment of a project, or alternatives totally outside the scope of the statutory authority of the particular agency.

From this, we now arrive at the decision of the court below in the instant case, in which the *non-production of energy* is held to be a reasonable alternative to the production of energy by a utility seeking licensing under the requirements of the Atomic Energy Act of 1954.

In drawing the logical conclusions from the prior decisions upon which it relied, the court below demonstrated the dangerous fallacy of that line of cases. Were the decision of the court below to be affirmed, the country would be presented with the spectacle of various federal courts attempting to produce a national energy policy for this nation by case-by-case review of licensing proceedings. No such result was intended by the Congress which passed NEPA; and no such result should be tolerated by this court.

SUMMARY OF ARGUMENT

Congress did not intend to legislate an end to industrial growth when it passed NEPA in 1969, nor did Congress intend to repeal the commitment to "scientific and industrial progress" spelled out explicitly in the Atomic Energy Act of 1954, a commitment which expresses the unique foundations of the American republic. Had Congress legislated an end to technological progress, such an Act would have been in violation of the most fundamental principles of the American Revolution and the United States Constitution. Nonetheless, this is the interpretation which has been placed upon NEPA by the court below in this and earlier cases.

The court below erred by interpreting NEPA in a manner contradictory to both the language and history of NEPA; namely by holding that NEPA requires the consideration of alternatives which are inconsistent with the mandate of the Atomic Energy Commission, now the Commission. Specifically, the court committed plain error by ruling that "conservation," i.e. reducing the production and consumption of energy, is a "colorable" alternative to building the power plant in question.

The court below further erred by requiring (and then rejecting) a "cost-benefit" analysis — a monstrosity which was nowhere contemplated by Congress, yet which, through judicial creation, has become the primary basis through which the courts now conduct substantive review of agency decisions. Finally, the court below erred in rejecting the threshold test applied by the Commission to "energy conservation" issues, and thereby created a new and impossible standard of compliance with NEPA — one which will be virtually incapable of ever passing judicial review. For all of these reasons, the basic interests of our Nation require reversal by this court.

ARGUMENT

Introduction. The question before this Court revolves around the proper construction of the National Environmental Policy Act of 1969. As the history of NEPA in the courts makes clear, this Act is open to a variety of interpretations. One interpretation, adopted by the court below, is that the *non-production* of energy, and restraint of economic growth, are viable, ponderable alternatives to the production of power under NEPA. Another interpretation is that NEPA represents a congressional commitment to the accomplishment of economic growth and technological progress by those means which have the least deleterious effects on the environment. *Amicus* here submits that the latter interpretation is that which is virtually compelled by every canon of construction.

The American Republic is unique among the Western nations in that it is the only country founded upon an explicit commitment to scientific and technological progress. A commitment to the idea of progress is the natural-law foundation of the United States Constitution, and is the generative principle which guided this country through its revolution and its replacement of the Articles of Confederation by the Constitution of 1787. To impute to Congress the intent to reverse this traditional policy *sub silento* would be monstrous — although this is exactly what the court below and some other lower courts have done. Such an imputation would defy 200 years of American history, it would defy this Nation's remarkable Constitution, and it would defy numerous other explicit congressional declarations. Congress's concern that technological progress continue in a manner which takes environmental considerations into account should not be read as an intent to attack technological progress *per se*, the very foundation of our republic. This is true for several reasons, which we shall set forth in order to provide a framework for the guidance of the Court in consideration of the arguments elaborated below.

1. Such an imputed attempt would presume that, *without ever saying so in legislative deliberations*, Congress intended a total reordering of our Nation's traditional priorities. No court has ever permitted Congress to be cast in such an

unfair light. As Justice Harlan stated in *U.S.* v. *Sisson*, 399 U.S. 267 (1970), one of his final opportunities to demonstrate his reverence for careful reading of statutes:

> The axiom that courts should endeavor to give statutory language that meaning that nurtures the policies underlying legislation is one that guides us when circumstances not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed. *Care must be taken, however, to respect the limits up to which Congress was prepared to enact a particular policy*, especially when the boundaries of a statute are drawn as a compromise resulting from the countervailing pressures of other policies." *U.S.* v. *Sisson*, 339 U.S. 267, 297-298 (emphasis added)

The court below did not exercise care. Rather, it imputed to Congress an intent to overthrow the basis of our history as well as its own previous statutory enactments such as the Atomic Energy Act of 1954. It did this on the basis of a vague and general statute with a scanty legislative history. This is contrary to the rule that:

> "A few words of general connotation appearing in the text of statutes should not be given a wide meaning contrary to settled policy, 'excepting as a different purpose is plainly shown.' " *U.S.* v. *American Trucking Association*, 310 U.S. 534, 543-544 (1940).

Other courts, noting that Congress expressed no different purpose, have properly read NEPA in context with other legislative expressions. *Florida Audubon Society* v. *Callaway*, 6 ERC 1320 (M.D. Fla. 1974). To the extent that any conflict can be found between NEPA and other enactments, the conflict must be resolved so as to give meaning to *all* of Congress's acts. This the court below refused to do.

2. To read NEPA as does the court below is, for the very reasons set forth elsewhere in this brief, to cast NEPA into

conflict with the spirit and policy of the Constitution of the United States, both as it has been expounded and rule upon, and in terms of its explicit policy of fostering technological progress. See, eg., U.S. Constitution, Art. I, Sec. 8, cl. 8. See *infra* sec. I. Thus, to read NEPA as did the court below (in conflict with other courts) is to, at the very least, cast a doubt upon the constitutionality of NEPA. It cannot be overemphasized that such a dubious reading was not compelled by either the legislative history of NEPA, nor by the plain language of NEPA. The court below therefore abandoned its duty to read the law so as to remove even a *doubt* as the the Constitutional validity of the law. See *Lynch* v. *Overholser*, 369 U.S. 705 (1962), and *I.A.M. v. Street*, 367 U.S. 740 (1961).

> "Federal Statutes are to be so construed as to avoid serious doubts as to their Constitutionality. 'When the validity of an Act of the Congress is drawn in question, and even if a serious doubt of Constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' *Crowell* v. *Benson* 285 U.S. 22, 62. *I.A.M.* v. *Street*, 367 U.S. 740, 749-750. See also *U.S.* v. *Harriss*, 347 U.S. 612, 618 (1954).

In other contexts, the court below has shown itself to be aware of this "cardinal principle." See *Accuracy in Media* v. *FCC*, 521 F. 2d 288, 297, n. 41. (D.C. Cir., 1975, Bazelon, J.). In the instant case, the court below has run rough-shod over this country's history of development and has gratuitously involved the Congress, the Executive, and the Judiciary in an unprecedented attempt to force technological progress into a Procrustean bed of court-created policy. Congress did not intend to thrust such a problem onto the courts. The courts should not impute any such intent to Congress.

3. Finally, any law which set out to bring a halt to technological development would entail disastrous consequences for this Nation and the world, quite apart from reversing the

legal history of this country. (1) Congress, without any debate in this subject in the legislative history of NEPA, cannot be held to have contemplated, let alone to have intended, such a result. The civil law maxim that *verba nihil operari melius est quam absurdo* (it is better that words should have no operation at all than that they should operate absurdly) surely must be invoked in such a situation as this. See *Church of the Holy Trinity* v. *U.S.* 143 U.S. 457 (1892). There it was said that:

> "If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity." 143 U.S. 457, 460.

How much more clear is the present case, where NEPA, read literally, is *not* absurd, but only entails absurd results *as construed*? In fact, the case is even clearer:

> "Even when the plain meaning did not produce absurd results, but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than literal words." *U.S.* v. *American Trucking Association* 310 U.S. 534, 543.

Thus, the court below introduced an element of absurdity, or at least unreasonableness, *into* NEPA without invitation in the words or history of that statute. This was plain error.

For all these reasons — the incongruity of the court below's interpretation of NEPA with the Nation's historical commitment, the hostility of the intent needlessly imputed to Congress by the court below to the Constitution and other laws of the United States, and the absurdity of the results of such a law as the court below interpreted NEPA to be — the court below was in error and ought to be reversed.

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1. See Appendix to this brief, p. 31, for the explanation of why a national energy policy based on conservation must lead to results directly contrary to the preservation of the environment, and why increasing energy consumption is actually the only solution to the energy "shortage."

I.

THE COURT BELOW ERRED IN CONSTRUING NEPA IN A MANNER REPUGNANT TO BOTH OTHER STATUTORY AUTHORITY AND TO THE CONSTITUTION.

There are three statutes governing this case: the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*), which created the Atomic Energy Commission and which defines its responsibilities; the Energy Reorganization Act of 1974 (42 U.S.C. 5801 *et seq.*) which divided the Atomic Energy Commission into the Nuclear Regulatory Commission and the Energy Research and Development Administration; and the National Environmental Policy Act (42 U.S.C 4321 *et seq.*). The former two statutes explicitly provide the mandate for the Atomic Energy Commission and Nuclear Regulatory Commission; NEPA has been construed as applying to the two Commissions, although it is doubtful that Congress ever intended NEPA's "major federal action" notion to apply to *licensing* actions.

Congress's explicit statement of policy respecting the development of atomic energy is set forth in the Atomic Energy Act of 1954:

> "Section 1. Declaration....Atomic Energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that —
>
> a. the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare,...
>
> b. the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, *increase the standard of living*, and

strengthen free competition in private enterprise.

Section 3. Purpose. — It is the purpose of this Act to effectuate the policies set forth above by providing for —

a. a program of conducting, assisting, and fostering research and development in order *to encourage maximum scientific and industrial progress*;...." (emphasis added)

Not only is this statement of policy extremely explicit, as opposed to the language of NEPA cited below, but it is entirely consistent with this Nation's historical commitment to technological development and industrial growth. The Energy Reorganization Act, concerned primarily with creating the Energy Research and Development Administration and the Nuclear Regulatory Commission out of the Atomic Energy Commission, stated in its Declaration of Purpose:

"The Congress hereby declares that the general welfare and common defense and security require effective action *to develop*, and increase the efficiency and reliability of use of, *all energy sources to meet the needs of present and future generations, to increase the productivity of the national economy* and strengthen its position in regard to international trade, to make the Nation self-sufficient in energy, to advance the goals of restoring, protecting and enhancing environmental quality, and to assure public health and safety." 42 U.S.C. §§5801, Sec. 2 (2). (emphasis added)

This act, passed five years *after* NEPA, repealed or changed none of the language of the Atomic Energy Act and still expressed a policy of *development* of all energy sources and *increasing* the productivity of the national economy.

The language of NEPA itself (Consumers App., p. 386) is

general and vague, and can in no way be taken to override or repeal the explicit policy statement of the Atomic Energy Act. Congress understood NEPA as a general statement of principles which would guide federal government officials in including environmental considerations in the decision-making process. No possible reading of NEPA could lead to the conclusion that Congress intended to reverse this Nation's traditional commitment to technological advance and industrial progress — as some lower courts have interpreted it. No possible reading of NEPA could lead one to the conclusion that Congress intended NEPA to hamstring or halt this Nation's nuclear energy program.

An interesting indication of Congress's actual perception and intent with respect to NEPA is provided by Professor Lynton Caldwell, the primary author of NEPA. Caldwell admits:

"NEPA *implies* a major modification and even a reversal of long-established priorities in the political economy of the Nation. The disruptive effects on the business as usual economy *do not appear to have been foreseen by the Congress* or those interests most likely to have been affected." Caldwell, "National Environmental Policy Act: Status and Accomplishments, 38 North American Wildlife and Natural Resources Conference 19-30, 26. (1973). (emphasis added)

Caldwell also grants that one possible interpretation of NEPA — which is also his own interpretation — is contradictory to this Nation's fundamental commitment to economic growth:

"The prevailing assumptions of business and politics have not been favorable to...NEPA. *There is a general national commitment to economic growth and development* and to private enterprise as its principal agent. This commitment tends to be poorly defined and indiscriminate...." (Ibid)

Such views of NEPA were not Caldwell's alone. In the first case in which NEPA was held to apply to the Atomic Energy Commission, this is how the lower court — the same court from which the instant case emanates — interpreted NEPA:

> "Several recently enacted statutes attest to the commitment of Government *to control*, at long last, *the destructive engine of material 'progress.'* But it remains to be seen whether the promise of this legislation will become a reality. *Therein lies the judicial role.*" *Calvert Cliffs Coordinating Committee* v. *AEC, 449 F. 2d 1109 (D.C. Cir. 1971).*

And what a judicial role it has become — particularly in that circuit! It was this interpretation of NEPA upon which the court below relied in the case at bar.

The Constitutional Interpretation Of NEPA.

We clearly have before us two possible interpretations of NEPA. One interpretation would be that which is consistent with the Atomic Energy Act's policy to develop atomic energy so as to "increase the standard of living" and "to encourage maximum scientific and industrial progress." The other interpretation would be that which views NEPA as hostile to the "national commitment to economic growth and development" (Caldwell) and as intended to "control...the destructive engine of material progress" (*Calvert Cliffs*).

If the latter interpretation — the interpretation adhered to by the court below — were accepted, it would be totally repugnant to the spirit and intent of the Constitution of the United States.

The Founding Fathers created the United States upon a foundation of universal Natural Law, in which the Idea of Progress was a central, generative principle. The Constitution and the republican forms of government created thereby were understood by the framers as instrumentalities for

realizing the notions of scientific and industrial progress — notions which could not have been realized as long as the colonies were under the domination of a British monarchy determined to maintain America in a condition of economic backwardness.

History could not be clearer that the foundations of the U.S. Constitution, and indeed of the Republic itself, were forged in the battle for progress. Countless parliamentary statutes and edicts during the first half of the eighteenth century were devoted to stifling industrial and commercial expansion in America. Legislation such as the Iron Act of 1750 — an act which prohibited the production of finished iron products in the colonies — put up formidable barriers to the development of manufactures and rising living standards for the colonial population. It was against this constriction of the "American genius for mechanical improvement" that Benjamin Franklin, George Washington, John Adams, Thomas Jefferson and others led a revolution and then constituted the United States of America.

Even after the Revolutionary War was won, however, the sabotage from the British throne did not cease. Instead of legislation, trade warfare, credit cutoff, and the fomenting of anarchy within the newly formed United States was directed to stifle the economic growth of the new republic. If the United States had not created the political structure for a rapidly developing *national* economy, it was virtually doomed to being split among the major European powers and returned to the status of a plantation. The Constitution was the solution arrived at by Washington, Alexander Hamilton, Franklin and other leading patriots, as the lawful political framework for building a strong industrial nation.

Hamilton, writing in the *Federalist* papers, argued for the advantages of the union as follows:

> "Under a vigorous national government, the natural strength and resources of the country, directed to a common interest, would baffle all the combinations of European jealousy to restrain our growth... An active

commerce, an extensive navigation, and a flourishing marine would then be the offspring of moral and plysical necessity." (Federalist, No. 11)

In a state of disunion, Hamilton argued, forces determined to stiffle the economic development of the new nationmight hope to succeed, with the consequences that

> "That unequalled spirit of enterprise, which signals the genius of the American merchants and navigators, and which is in itself an inexhaustible mine of national wealth, would be stifled and lost, and povery and disgrace would overspread a country which, with wisdom, might make herself the admiration and envy of the world... It belongs to us to vindicate the hono of the human race... Union will enable us to do it." (*Id.*)

Under the Constitutional plan of government molded by the Founding Fathers, the United States did become the "admiration and envy of the world" despite continued atempts to restrict America's industrial development, and to restrain our growth." Today such attempts are still perpetraed, but today the efforts to stifle the development of the national wealth come from within, not from Europe.

Hamilton's proposal for, and the establishment of, the Bank of the United States, his *Report on the Subject of Manufactures*, and his *Report on Public Credit* to the Congress, and even the programs of anti-Federalist Thomas Jefferson for public improvements provide overwhelming evidence that the Founding Fathers *unanimously* undersood industrial growth to be the fundamental policy commiment of the new nation.

Without question, this was also the understanding of the early Supreme Court, and was expressed most profoundly by Chief Justice John Marshall and Associate Justice Joseph Story. Major decisions of Marshall and Story, such as *Gibbons v. Ogden*, 9 Wheaton 1 (1824), *Dartmoth College v. Woodward*, 4 Wheaton 518 (1819), or *McCulloch v. Maryland*,

4 Wheaton 316 (1819), can only be understood as expressing a commitment to a policy of encouraging the rapid development of commerce and industry, and of fashioning the instrumentalities of government to that end.

In *Grant v. Raymond*, 6 Peters 218 (1832), a case involving a disputed patent, Marshall wrote:

> *To promote the progress of useful arts, is the interest and object of every enlightened government.* It entered into the views of the framers of our constitution, and the power 'to promote the progress of science, and useful arts, by securing for limiting times to authors and inventors the exclusive right to their respective writings and discoveries,' is among those expressly given to Congress..." (6 Peters 241) (emphasis added)

In his renowed *Commentaries on the Constitution*, (1833), Story noted,

> "A question has recently been made, whether Congress have a constitutional authority to apply the power to regulate commerce for the purpose of encouraging and protecting domestic manufactures." (*Commentaries*, II, § 1077.)
>
> "Now it is well known that, in commercial and manufacturing nations, the power to regulate commerce has embraced practically the encouragement of manufactures...
>
> "It is manifest, from contemporaneous documents, that one object of the Constitution was to encourage manufactures and agriculture by this very use of the power. *(1)*" (II, § 1082)

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1 Elliot's Debates, 74, 75, 76, 77, 115; 3 Elliot's Debates, 31, 32, 33; 2 Amer. Museum, 371, 372, 373; 3 Amer. Museum, 62, 554, 557; The Federalist, No. 12, 41; 1 Tuck. Black. Comm. App. 237, 238; 1 American Museum, 16, 282, 289, 429, 432; Id. 434, 436; Hamilton's Report on Manufactures, in 1791; 4 Elliot's Debates, App. 351 to 354.

The lasting relevance of Story's argument emerges with striking clarity in the next section where he argues that although a foreign nation might impose economic restraint upon our country, it is inconceivable that we would impose it upon ourselves.

> "In the first place, if Congress does not possess the power to encourage domestic manufactures by the regulation of commerce, the power is annihilated for the whole nation... Such a policy, voluntarily adopted by a free people, in subversion of some of their dearest rights and interests, would be most extraordinary in itself,... and utterly without example in the history of the world.
>
> "No man can doubt that domestic agriculture and manufactures may be most essentially promoted and protected by regulations of commerce... Why, then, should the power be surrendered and annihilated? It would introduce and perpetuate national debility, if not national ruin. *A foreign nation might, as a conqueror, impose upon us this restraint as a badge of dependence and a sacrifice of sovereignty, to subserve its own interests; but that we should impose it upon ourselves is inconceivable.* The achievement of our independence was almost worthless, if such a system were to be pursued. (II, § 1084.) (emphasis added)

Justice Story's opinions from the bench as well as his *Commentaries* expressed the Nation's Constitutional commitment to a standard to law which would encourage public improvements and economic development. In *Van Ness v. Pacard*, 2 Peters 144 (1829), speaking for the court, held that a law which detered the development of land was unreasonable. The case involved the common law principle that fixtures erected upon rental property become part of the property. Story argued that common law must be interpreted according to the fundamental principles of public policy, which were "to encourage trade and manufactures." During the colonial period, "the country was a wilderness, and the

universal policy was to procure its cultivation and improvement." Upon such considerations, the court ruled that the defendant Pacard could remove improvements from the rented property. *Van Ness v. Pacard*, 2 Peters 144, 145 (1829).

Story's famous dissent in the *Charles River Bridge* case located his views of contracts and charters in the context of public development, and, indeed, it could have been written as a commentary on the circumstances surounding the construction of commercial nuclear reactors today, under the procedures mandated by interpretations of NEPA *(3)*:

> "I can conceive of no surer plan to arrest all public improvements, founded upon private capital and enterprise, than to make the outlay of that capital uncertain, and questionable both as to security and to productiveness." *Charles River Bridge v. Warren Bridge*, 11 Peters 420, 608, (1837).

To summarize, the interpretation of NEPA by the court below is an interpretation which is incongruous with the

3. The timelessness of Justice Story's warning is underscored by the following article which appeared on page one of the *New York Times*, May 15 under the headline "G.E. Warns of Halt in Making Reactors":

> "The General Electric Company has told the Federal Government that if legal and policy restrictions on nuclear technology continue it will eventually stop making nuclear reactors...
>
> " 'We said that unless the legal, political, and regulatory climate is turned around, the industry is in a bad way,' (George J. Stathakis, a General Electric executive) said. 'We can't go on forever without orders.'
>
> " 'Even with a substantial amount of conservation, we believe there is going to be a need for a substantial amount of nuclear power in the coming decades. We cannot ignore the nuclear option.'
>
> "But he said that the nation's utilities 'have to become confident that there are not going to be continuing delays when they make a nuclear decision'."

governing statuatory authority and with the intent of the United States Constitution. It is an interpretation which would lead to an absurd result — the national ruin of the country. On these grounds alone, it ought to be reversed by this Court.

II.

THE COURT BELOW ERRED BY INTERPRETING NEPA IN A MANNER INCONSISTENT WITH THE MANDATE OF THE COMMISSION. NEPA DOES NOT REQUIRE ALTERNATIVES INCONSISTENT WITH THE OBJECTIVES OF A PROJECT.

The court below erred in its holding that "energy conservation" and a reduction of consumer demand for energy is a reasonable or colorable alternative to the goals of the project. Reducing the production of energy is not a reasonable alternative to the mandate of the Commission for the *development and production* of nuclear energy.

Section 102 of NEPA requires a "detailed statement" to be included "in every recommendation or report on proposals for legislation and other major Federal action..." on:

> "(i) the environmental impact of the proposed action,...
> (iii) alternatives to the proposed action,
> (iv) the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity..."

The court below, speaking in *Calvert Cliffs Coordinating Committee Inc. v. AEC*, 449 F. 2d 1109 (D.C. Cir. 1971), held that NEPA did in fact apply to licensing proceedings of the Atomic Energy Commission, and that the Commission was required to "take the initiative" in considering alternatives. The same court, in *NRDC v. Morton*, 457 F. 2d 827 (D.C. Cir. 1972), further extended the scope of NEPA to require that an agency investigate every alternative which is not remote or speculative — including partial or total abandonment of a project, and alternatives that involve considerations clearly outside the authority of a particular agency, such as foreign policy and national security matters. The same court then further extended the scope of NEPA alternatives in the instant case by its ruling that the non-production of energy is a "colorable" alternative to building a nuclear power plant. This interpretation of NEPA is in conflict with both the legislative intent of NEPA and with rulings in other courts and circuits.

The legislative history of NEPA shows without question that Congress had a view of alternatives which was far more reasonable than the extraordinarily broad range required by *NRDC v. Morton supra*. In two places in the *Congressional Record*, NEPA's sponsor Senator Henry Jackson states the range of alternatives which would need to be considered:

> "(iii) The *alternative ways of accomplishing the objectives of the proposed action* and the results of not accomplishing the objectives." 115 *Congressional Record* 40420 (1969). (emphasis added)

In the "section-by-section analysis" of NEPA presented on October 8, 1969 Jackson stated:

> "(ii) Wherever adverse environmental effects are found to be involved, a finding must be made that those effects cannot be avoided by reasonable alternatives which will achieve the intended purposes of the proposal. Furthermore, a finding must be made that the action leading to the adverse environmental effects is justified by other considerations of national policy and those other considerations must be stated in the finding." 115 *Congressional Record* 29085 (1969).

Obviously Congress was not demanding that the agencies

investigate any and all alternatives to a proposed action; it was only requiring the investigation of reasonable alternatives which would achieve the objectives of the proposed action.

The court in *Florida Audubon Society v. Callaway*, 6 ERC 1320 (M.D. Florida 1974) applied NEPA in a manner more consistent with the original NEPA legislation, in contrast to *Calvert Cliffs* or *NRDC v. Morton*.

In *Florida Audubon*, the defendant Corps of Engineers sought to issue a permit to defendant-intervenor Offshore Power Systems, Inc. (OPS). Plaintiffs attempted to enjoin issuance of the permit, alleging that the Corps' impact statement violated NEPA because it failed to develop in detail alternative site selection data. The range of site alternatives selected by OPS, which the court upheld, was confined to those alternatives which met with the proper objective of the project; those alternative sites not satisfying those objectives were eliminated.

As one commentator stated in reference to *Florida Audubon*,

> "*Florida Audubon* lends support to the statutory objectives approach to deliminating an appropriate range of alternatives. The Corps' function, at least in the context of issuing dredge permits, was arguably limited to reviewing the permit applications submitted to it. The Corps had a statutory responsibility to review the plan which OPS sought to implement, and based on its review, to make the appropriate recommendations. The court acknowledged that the Corps had not omitted any significant sites. It did not charge the Corps to undertake an independent study of its own to consider alternatives. Rather, mindful of the objective of the project and of OPS' selection of those alternatives which would facilitate attainment of the project objective, the court required that the Corps conduct a review of the objective and the related alternatives to ensure that OPS'

> evaluation of sites fairly appraised the relevant environmental considerations. Thus, in requiring that the Corps delimit a range of alternatives, *the court was aware of the Corps' statutory objectives. Its interpretations of the Corps' duty to consider environmental factors, including alternatives, harmonized with the Corps' review function as prescribed by its legislative mandate.*" Nicholas Chamousis, "The National Environmental Policy Act of 1969: What 'Alternatives' Must An Agency Discuss," 12 *Columbia Journal of Law and Social Problems* 221, 146-247. (emphasis added)

In fact, NEPA has not even been uniformly applied among the Circuit Courts to the licensing of nuclear reactors. In *Morningside Renewal Council v. U.S. A.E.C.*, 482 F. 2d 234 (2nd Cir. 1973); *cert. denied*, 417 U.S. 951, the Second Circuit Court of Appeals held that a NEPA Environmental Impact Statement was not required for the licensing of a research reactor built by Columbia University, saying that "licensing in this case was not a 'major federal action significantly effected the quality of the human environment.' " (482 F. 2d at 238.) Although this is applied to a research reactor which is significantly smaller than commercial power reactors, the reactor is located right in the midst of a major metropolis. Still, an Environmental Impact Statement was not necessary.

The decision of this Court in *Flint Ridge Development v. Scenic Rivers Association of Oklahoma*, 96 S. Ct. 2430 (1976), although dealing with a different fact situation, is also applicable to this case.

In *Flint Ridge Development*, the Court agreed with petitioner's argument that the general language of NEPA had to give way before specific requirements of other federal laws:

> "... even if HUD's action in allowing a disclosure statement to become effective constitutes a major federal action significantly affecting the quality of the human

environment within the meaning of NEPA, HUD is nonetheless exempt from the duty of preparing an environmental impact statement because compliance with that duty is not possible if HUD is also to comply with the Disclosure Act's requirement that statements of record become effective within 30 days of filing, unless incomplete or inaccurate on their face." *Flint Ridge Development*, 96 S. Ct. at 2437.

This court reasoned as follows:

"Section 102 (of NEPA) recognizes, however, that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way. As we noted in *United States v. SCRAP*, 412 U.S. 669, 694... 'NEPA was not intended to repeal by implication any other statute...' " *Flint Ridge Development*, 96 S. Ct. at 2438.

III

THE COURT BELOW ERRED IN REQUIRING AND THEN REJECTING THE "COST-BENEFIT" ANALYSIS PREPARED BY THE COMMISSION. THE COURTS SHOULD NOT BE PERMITTED TO CONDUCT A SUBSTANTIVE REVIEW OF AGENCY DECISIONS.

The results reached by the court below go far beyond the bounds of proper judicial review of agency decisions, and strongly demonstrate that the courts should not be permitted to conduct a "substantive" review of agency decisions. The scope of the review undertaken by the court below was essentially that a review on the merits, which cannot be justified by the plain language of NEPA, by its legislative history, or by any authority from this Court. This far-reaching scope of review is based upon a series of lower court decisions which have created a situation of intrusion and usurpation of agency authority and responsibility by the courts.

The court below remanded to the Commission for a "re-

calculation of costs and benefits" and a "reopening of the issues of energy conservation alternatives." (Consumers App., p. 21). A "cost-benefit" analysis, and its far-reaching implications, is nowhere to be found or even remotely discussed in NEPA's legislative history. It is entirely a judicial creation, stemming from the *Calvert Cliffs* case. In fact, the broad range of alternatives discussed above in *NRDC v. Morton* were only for the preparation of an Environmental Impact Statement, and were specifically to be utilized in the "cost-benefit" analysis first demanded by *Calvert Cliffs*.

The "cost-benefit" analysis is solely for the use of the reviewing court. The requirement of the cost-benefit analysis implies (and under the requirements of judicial review, *insists*) that there is actually one environmentally "optimally beneficial" alternative. *Calvert Cliffs*, *supra*, at 1123. Implicit in this is the novel and arbitrary idea that it is for the reviewing court to finally decide which alternative is optimal.

It is clear that if the agency does not choose the one "optimal" alternative, or if the agency has incorrectly weighted certain values, or if the agency has not deftly avoided any one of innumerable pitfalls, its "cost-benefit" analysis is therefore suspect, and is remanded for further consideration.

The result is that it is the courts and not the agencies which are actually making these decisions. What now occurs in agency proceedings is simply the preparation of a record for the reviewing court. This is clearly an untenable situation. Regulatory agencies have been created by Congress so that Congress and the courts need not become involved in every decision on matters before the agency. This result is not the result of any congressional action or intention, but is a creation of the courts. The notion of judicial review of Environmental Impact Statements is never even mentioned in the legislative history of NEPA; much less is there any suggestion that the courts would be making nearly all final

decisions under NEPA. (1)

This unintended result is derived from *Calvert Cliffs*. The dicta of the *Calvert Cliffs* court provided what became the two most important principles of judicial review under NEPA. The first, indirect statement opened the way for judicial review of substantive decisions:

> "We conclude, then, that Section 102 of NEPA mandates a particular sort of careful and informed decision-making process and creates judicially enforceable rights. The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." *Calvert Cliffs* at 1115.

In the second statement, the *Calvert Cliffs* court found that there was an optimally beneficial action that could be defined and discovered beforehand, and further, that NEPA mandated that the optimally beneficial alternative be chosen:

> "*NEPA mandates a case-by-case balancing judgment* on the part of federal agencies. In each case, the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would affect the balance of values... The point of the individualized balancing analysis is to ensure that, with possible alterations, the *optimally beneficial action is finally taken.*" *Calvert Cliffs* at 1123 (emphasis added)

1. The fate of the proposed Environmental Protection Act of 1971 (S. 1032, 92nd Congress, 1st Session), the "Hart-McGovern bill," is perhaps the best indication of the intentions of Congress with respect to NEPA and the judicial review. The Hart-McGovern bill was introduced shortly after NEPA was enacted, and as an amendment to NEPA, precisely for the purpose of incorporating the judicial role which had been entirely omitted in NEPA itself. It would have included, *inter alia*: citizen standing on behalf of the environment; extensive discovery rights; the need for a plaintiff-intervenor to make only a prima-facie showing; the requirement of any bonds would be eliminated; and the courts would be permitted to grand declaratory and injunctive relief in addition to damages. This bill never made it out of committee, despite the fact it was introduced in 1971, 1972, 1973, 1974, and 1975, and that extensive hearings were held on it.

It is here, for the first time, that the language "NEPA mandates" appears. The court is forced to create a "mandate of NEPA"; otherwise, there is nothing in NEPA itself or in its legislative history which would indicate the results that the court in *Calvert Cliffs* arrives at. (1)

The "NEPA mandate" of *Calvert Cliffs*, combined with the untenably broad range of alternatives required by *NRDC v. Morton*, has thrust the courts into the position of having to choose among a complex series of subjective judgments by which contending parties choose the "optimal balance" of costs and benefits. Values assigned to "costs" and "benefits" are almost always arbitrary, short-term, and scientifically dubious; nonetheless such arbitrarily assigned judgments of "costs" and "benefits" become part of the record upon which the reviewing courts must base their decisions. As a result, the courts are now in the unenviable position of having to second-guess agency decisions, and intrude into sub-

1. The "mandate of NEPA" is perhaps the richest part of the "common law" of NEPA that has been developed. Justice Marshall has undoubtedly provided the best rationale for the extraordinary development of such a "common law:"

> "(T)his vaguely worded statute seems designed to serve as no more than a catalyst for development of a "common law" of NEPA. To date, the courts have responded in just that manner and have created such a common law." *Kleppe v. Sierra Club*, 96 S. Ct. 2718, 2735 (1976) (Marshall, J., dissenting)

As can be seen from the instant decision by the court below, the "common law" of NEPA has grown by leaps and bounds so that it in no way resembles NEPA itself or any possible intent by Congress in passing NEPA.

stantive areas which are the lawful responsibility of the Commission and other regulatory agencies.

IV

THE COURT BELOW ERRED BY HOLDING THAT THE THRESHOLD TEST APPLIED BY THE COMMISSION VIOLATED THE "BASIC MANDATE" OF NEPA. THE COURT BELOW HAS CREATED A NEW AND IMPOSSIBLE BURDEN OF COMPLIANCE WITH NEPA.

The court below held that the "threshold test" applied by the Commission to consideration of "energy conservation" issues violated the "basic mandate" of NEPA, and therefore remanded these issues to the Commission for further consideration. Even assuming *arguendo* that energy conservation is a "colorable alternative," the court below erred by rejecting the threshold test and thereby created an impossible new burden of compliance with NEPA.

The court below understood clearly that the "threshold test" was soundly based on the rule of reason:

> The Commission derived the 'threshold test' from the 'rule of reason' courts use in reviewing the sufficiency of the alternatives considered in an EIS. *NRDC v. Morton* (Consumers App., p. 12)

The court below does not state or argue that the "threshold test" violates the "rule of reason," yet it rejected it. In so doing, the court below has created a new and impossible standard of compliance for NEPA.

Prior to the decision of the court below, the Commission was required to consider all *reasonable* alternatives. Based on the criteria set forth by the court below, the Commission is now required to consider any and all "colorable" alternatives. Further, the Commission must prove why a

"colorable" alternative should not be considered in an Environmental Impact Statement.

This is an astonishing result. *The Commission would be required to consider and disprove every unreasonable alternative:*

> It is incumbent on the Commission to undertake its own preliminary investigation of the proferred alternative sufficient to reach a rational judgement whether it is worthy of detailed consideration in the EIS. Moreover, the Commission must explain the basis for each conclusion that further consideration of a suggested alternative is unwarranted. (Consumers App. p. 13)

Such a requirement is clearly untenable and required reversal by this Court. If the Commission must first deal with every conceivable unreasonable alternative in addition to the present necessity of considering every reasonable alternative, it becomes an infinite and endless task, and one that is incapable of ever passing judicial review.

In the instant case, the Commission clearly stated that it would and did consider all reasonable alternatives (including a number of those categorized as "energy conservation" alternatives). With respect to all alternatives that were remote and speculative, the Intervenors were invited to provide reasons why the alternative was not unreasonable, and thus bring it onto the threshold level, into the realm of reasonableness. This the Intervenors declined to do. There was nothing more that the Commission could have — or should have — done.

It is difficult not to conclude that the court below simply did not agree with the result of the Commission rulings, and thus by stretching the settled law of NEPA from "reasonable" to "colorable," it was able to produce a result more to its liking. In any event, in requiring the Commission to consider and disprove all "colorable alternatives, the court below impermissibly extended the standard of compliance under NEPA. For this reason among others the decision of the court below must be reversed by this Court.

CONCLUSION

In our constitutional scheme of republican govenment, the framers envisioned the Judiciary as that branch of government which would be most impervious to publi pressure, and which therefore must be the bulwark of th most fundamental self-interest of the Nation. We believe tat the case now before this Court presents such basic issus of public policy which must be resolved from the standoint of the fundamental and permanent interests of the American people.

We therefore respectfully urge this Court to everse the ruling of the court below.

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APPENDIX

The idea that energy conservation could ever be a substitute for increased energy production is a dangerous fallacy. Scientific inquiry invariably shows that at any given historical point, mankind has always faced an apparent limit to existing energy resources. This apparent limitation is resolved, not by the futile attempt to conserve and extend existing resources, but by the development of new technologies which make possible the utilization of new resources. The successive utilization of wood, charcoal, coal, petroleum, natural gas, and uranium as resources represent scientific breakthroughs achieved by applying human intelligence to the problem of creating new resources (See Table 1). The next such breakthrough is represented by controlled thermonuclear fusion, which will utilize common sea water as its source of fuel. (See Table 2.)

The development and application of such creative innovations requires increased energy throughput, just as does the maintenance of the biosphere itself. Such development requires not only the fostering of individual scientific achievement, but that the population as a whole enjoys that level of rising cultural and material living standards which enables the labor force to assimilate technological advances. Only an increase in consumption levels has historically made possible the rising social surplus necessary for technological discoveries and applications. (See Table 3.)

Conservation as the basis of an energy policy — that is, treating conservation as an energy *source* — must lead to results directly contrary to the professed goals of preserving the environment and the biosphere. Contrary to the belief of the court below, modern science understands that the energy cycle is not closed, but continuously expanding. Conversely, attempting to close the energy cycle entails its collapse. "Conserving" existing resources merely postpones the day of reckoning when a given, defined resource runs out. But the history of this country is a dramatic confirmation of the fact that the successive definition of previously-useless materials

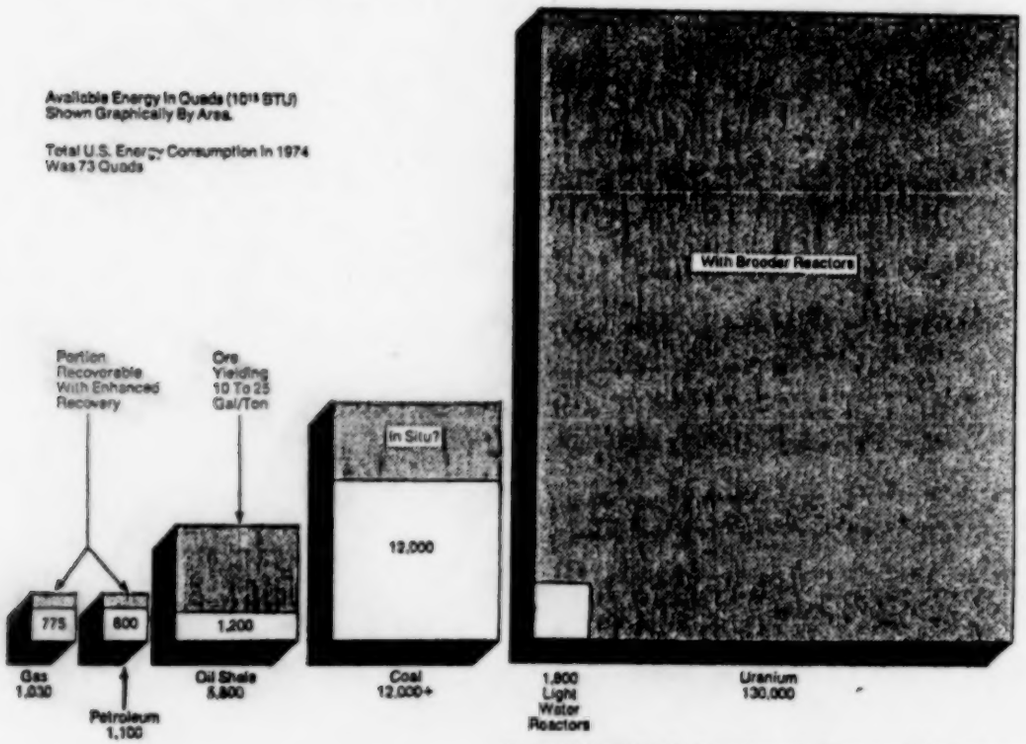
as energy resources (oil, uranium) represents the solution to the apparent necessity of conserving the existing "fixed" resources.

Thus it should be obvious that a unit of energy conserved is absolutely *not* the equivalent of a unit of energy newly produced. Rising social productivity depends, now and always, upon rising per capita levels of energy consumption, both with respect to personal consumption and with respect to industrial processes becoming more energy-intensive. Any contrary policy must lead to the lowered productivity of labor and capital, with cumulative chain-reaction effects upon the physical environment. This is perhaps most obvious with respect to agriculture, where lower energy inputs (in the form of fertilizer, power for irrigation, or mechanized cultivation) will result in the rapid depletion of output and the destruction of the topsoil. Americans saw such destruction with the creation of the "dustbowl" during the 1930s depression.

Furthermore, it has only been by accelerating the intensity of use of *existing* resources that the preconditions for the discovery and application of new technologies have been laid. In the entire history of science, no example exists of the decreased use of old resources "buying time" for new discoveries. To the contrary, such a policy of conservation, by depleting the social surplus which is the basis of rising living standards and increased commitment of resources to basic scientific research, on which fundamental technological advance depends, actually *precludes* new discoveries and their application.

Rising rates of per capita energy consumption will effect a greater than one-to-one correspondence in rising rates of social productivity and technological advance. (See Table 4.) Stagnation or reduction of per capita consumption commits our country to a dead-end downward spiral of depletion and disaster. Proposing conservation as a solution to the energy crisis is akin to proposing starvation as the solution to a food shortage.

Table 1. Available Energy from Recoverable Domestic Energy Resources



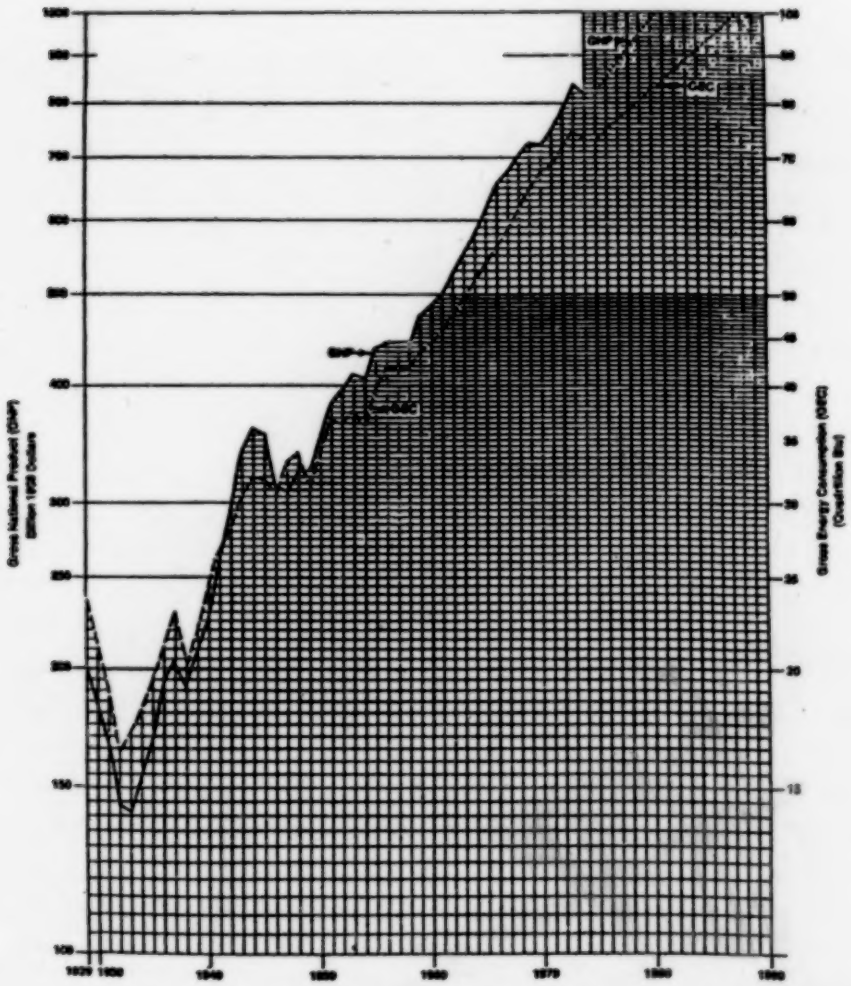
Source: A National Plan For Energy Research, Development & Demonstration, ERDA-48 (1975).

Table 2. Energy Source and Power Density

Energy Source	Power Density (kilowatts per square meter)
Solar, biomass	.0001
Solar, earth surface	.2
Solar, earth orbit	1.4
Fossil fuels	10,000
Solar at sun surface	20,000
Fission	70,000
Fusion (early commercial)	70,000
Fusion (theoretical limit)	above several millions of trillions of watts

Source: 4 Executive Intelligence Review, No. 8, p. 34.

Table 3. Gross National Product and Gross Energy Consumption



Source: Dr. Ralph Lapp, American Nuclear Society, Connecticut Chapter.

Table 4. Rates of Growth of Energy per Capita

Year BP	Per Capita Energy	Rate Of Growth	2nd Order Rate
1,000,000	2	2.0×10^{-5}	4.4×10^{-6}
100,000	5	$.8 \times 10^{-4}$	1.4×10^{-5}
5,000	12	3.6×10^{-4}	2.3×10^{-2}
500	26	6.0×10^{-2}	4.0×10^{-2}
100	77	1.6×10^{-1}	
0	230	1.5×10^{-1}	

Source: U.S. Labor Party Research and Development Staff.